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Alpine Village Co. v. City of McCall Appellant's Reply Brief Dckt. 39580

IN THE SUPREME COURT OF THE STATE OF IDAHO

ALPINE VILLAGE COMPANY, an Idaho Corporation, Plaintiff-Appellant, v. **CITY OF MCCALL,** a Municipal Corporation, Defendant-Respondent.	**Supreme Court Case No. 39580** District Court No. CV-2010-519-C

APPELLANT'S REPLY BRIEF

Appeal from the District Court of the Fourth Judicial District
of the State of Idaho in and for Valley County

Honorable Michael R. McLaughlin, District Judge, presiding

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I. Introduction.

The City readily concedes in its *Respondent's Brief* that when Alpine filed its development applications Alpine was faced with a non-discretionary, non-variable Ordinance that required Alpine to provide community housing units as part of its condominium project. The Ordinance (Ordinance No. 819) required developers of residential subdivisions to provide "community housing units" equal in number to a specified percentage of the total units in the subdivision.[1] These community housing units were required to be deed restricted units available for purchase or rent only by income qualified persons.[2]

At the core of the case before this Court is the issue of whether Alpine's noncompliance with I.C. §50-219 deprives this Court of jurisdiction to consider the undisputed facts upon which Alpine contends that its non-compliance should be excused. Rather than address the merits of Alpine's argument as to whether the requirements of I.C. §50-219 are jurisdictional, the City, instead, chooses to mischaracterize Alpine's position as being that the notice requirement of the statute "is optional". *Respondent's Brief* at 13. That is of course not Alpine's position, nor has it ever been Alpine's position in this litigation. Rather, Alpine argues that neither I.C. §50-219, nor I.C. §6-908 (which the District Court held is applied to Alpine's claim against the City, through I.C. §50-219) contain the clear and unequivocal language which is required to divest this

[1] Alpine Village is considered a "subdivision" under the McCall City Code.
[2] Ordinance 819 was codified as McCall City Code §9.7.10. R., Ex. II (Ex. 3). It allowed an applicant who was subject to the Ordinance to comply in any one or a combination of the following four ways: (i) to build community housing units on the site of the development; (ii) to build or provide the community housing units off-site; (iii) to provide land for the construction of community housing units; and/or (iv) to pay an "in lieu fee".

Court of jurisdiction. As a consequence, this Court is free to consider the unique facts of this case as they relate to Alpine's equal protection and estoppel claims.

The City does not dispute the fact that, after Ordinances 819 and 829 were declared unconstitutional, the City invited and paid refund requests from fifty-eight other parties who had paid community housing fees pursuant to Ordinance 820. The accrual date for these claims would unquestionably have been the date on which the fees were paid. The City accepted and paid refund requests which were submitted as long as *forty-three months* after the fees had been paid. The City did not assert I.C. §50-219 as a bar or defense to any of these refund requests, although the City admits that it could have done so. Yet, when Alpine's claim was submitted to the City within a lesser time frame than was allowed to the aforesaid refund claimants, the City invoked I.C. §50-219 as a bar to the claim.[3] Rather than offering any explanation or rationale whatsoever for this disparate treatment of Alpine, the City simply argues that there was no disparate treatment, because Alpine was "made whole" by the City's release of the community housing restrictions on the Timbers units more than seventeen months after Alpine's purchase of the Timbers complex.[4] This position is both factually and legally unsustainable.

On the issue of whether Alpine's federal claim is "ripe" under "prong 1" of the U.S. Supreme Court's decision in *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City,* 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985), the City argues that Alpine's federal claim fails because Alpine failed to "probe alternatives" to the acquisition of the

[3] The District Court held that Alpine's state constitutional claim accrued not later than December 13, 2007. Alpine's claim was delivered to the City on November 15, 2010, or approximately thirty-five months after the date of accrual.

Timbers units. *Respondent's Brief* at 32. The City contends that Alpine could have proposed a less intrusive manner of compliance with Ordinance 819 which would have eliminated or mitigated Alpine's subsequent takings claim. *Id.* p. 30-32. The principal problem with this argument is that it ignores the undisputed facts of record. The community housing plan which Alpine initially proposed would have used mobile home spaces already owned by Alpine to satisfy the Ordinance's requirements on an interim basis, to be replaced by permanently designated off site units in Phase 3 of the project. R., Ex. II (Ex. 4). This plan was precisely the kind of plan which the City now argues Alpine should have proposed; namely, a plan which would *not* have required Alpine to acquire property prior to the disposition of the *Mountain Central Board of Realtors* litigation.[5] Yet, as the City concedes, this plan was rejected by the City. *Respondent's Brief* at 9. Thus, despite being faced with the prospect that its Ordinance might be invalidated in the pending litigation, the City continued to enforce the Ordinance and rejected the very kind of plan which the City now suggests might have avoided this litigation. The City offered Alpine two choices: (i) abandon its applications, or (ii) present a plan which complied with the Ordinance *and* which designated the off-site community housing units for the entire project.

The other alternative which the City contends could have been utilized by Alpine in satisfaction of its community housing obligations was to pay an "in lieu" fee. Under the Ordinance, this fee would have been calculated based on the cost to the City of constructing or

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[4] The Timbers was a condominium complex which was purchased by Alpine solely to comply with the community housing requirement.

[5] *Mountain Central Board of Realtors, Inc. v. City of McCall* (Valley Case No. CV-2006-490-C)

acquiring community housing units. Curiously, the City's position is that, had Alpine done so, the City would have refunded the in lieu fee when Ordinance 819 was declared unconstitutional. *Respondent's Brief* at 31. Yet, the City's position in this litigation is that it is under no legal or equitable obligation whatsoever to refund to Alpine any of the money which Alpine expended in providing the very same units itself.

II. This Court is not divested of jurisdiction to consider Alpine's claims that it should be excused from compliance with I.C. §50-219.

The District Court found that the provisions of I.C. §6-908 are applicable to Alpine's claim via I.C. §50-219.[6] Assuming arguendo that I.C. §6-908 is applicable to Alpine's state constitutional takings claim, the issue before this Court is *not* whether Alpine is entitled to disregard I.C. §50-219 or whether compliance with the statute is a "condition precedent" to the pursuit of a claim for damages against the City. The narrow issue presented by this case is whether this Court is deprived of jurisdiction to consider Alpine's claims that its noncompliance with the statute should be excused. Stated otherwise, the issue is whether either I.C. §50-219 or I.C. §6-908, on their face, contain sufficiently clear and unequivocal evidence of a legislative intent to overcome the presumption of jurisdiction which this Court has held is enjoyed by courts of general jurisdiction.[7]

While Alpine recognizes that the Court of Appeals described compliance with the ITCA as a jurisdictional requirement in *Madsen v. Idaho Dept. of Health & Welfare*, 116 Idaho 758, 779 P.2d 433, (Ct. App. 1989), Alpine respectively submits that this issue has never been

[6] In its Opening Brief, Alpine has challenged that holding and will not re-visit those arguments in this Reply.

squarely addressed by this Court. The simple fact of the matter is that a holding that the statute is a "condition precedent" to the pursuit of a claim does not answer the question of whether non-compliance is jurisdictional. Although the issues of actual or constructive notice arose in two of the cases cited by the City, it does not appear that any defense to noncompliance with the statute was asserted in any of the cases cited by the City, let alone a defense which was based on the conduct of the state or municipality. In such cases, this Court would have had no reason to address the issue presented herein. The issue has, however, arisen and been analyzed in a significant number of other jurisdictions. It is for this reason that Alpine has presented the decisions of those jurisdictions to this Court for consideration. The City has elected to not respond to, discuss, or refute any of the reasoning or holdings in the cases cited by Alpine, nor to address the underlying and well established principle that courts of general jurisdiction are not to be deprived of that jurisdiction casually or impliedly.

This Court's implicit recognition of this principle and of the legitimate legal distinction between a condition precedent which is jurisdictional and one which is procedural is evidenced in the language of I.R.C.P. 84(n), which provides:

> (n) Effect of Failure to Comply With Time Limits. The failure to physically file a petition for judicial review or cross-petition for judicial review with the district court within the time limits prescribed by statute and these rules *shall be jurisdictional* and shall cause automatic dismissal of the petition for judicial review upon motion of any party, or upon initiative of the district court. Failure of a party to timely take any other step in the process for judicial review *shall not be deemed jurisdictional, but may be grounds only for such other action or sanction as the district court deems appropriate, which may include dismissal of the petition for review.* (emphasis added).

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[7] See *Troupis v. Summer*, 148 Idaho 77, 80, 218 P.3d 1138, 1141 (2009); *Borah v. McCandless*, 147 Idaho 73, 78, 205 P.3d, 2019, 1214 (2009).

Alpine submits that the correct legal holding under the facts of this case would be that the requisite legislative intent to elevate the requirements of I.C. §50-219 or I.C. §6-908 to jurisdictional requirements is simply lacking. As a result, Alpine's constitutional and equitable arguments that the City should not be allowed to assert the statute against Alpine as a bar should be considered. Because those arguments are based on uncontroverted facts and were presented below as part of the cross motions for summary judgment, they are ripe for review and resolution by this Court.

III. The City should be held to be constitutionally and equitably barred from asserting I.C. §50-219 as a defense to Alpine's state takings claim.

A. Alpine's equal protection claim.

Alpine recognizes that the rational basis test which is applicable to Alpine's equal protection claim affords substantial deference to the City's explanation of the basis for distinguishing the treatment which was afforded to Alpine, as opposed to the other fifty-eight persons who were adversely impacted by the City's companion Ordinances 819 and 820. However, despite repeated invitations in this litigation to do so, the City has offered *no* basis for the disparate treatment. Instead, the City denies that there was any disparate treatment because Alpine received "the equivalent of a full refund." *Respondent's Brief* at 17. This assertion flies in the face of the undisputed facts of record.

Fifty-eight other persons who were adversely affected by Ordinances 819 and 820 were given up to forty-three months to assert their refund claims. R., Vol. III, p. 402. Although the City readily acknowledges that it could have asserted I.C. §50-219 as a bar to each and every one

of those claims, it declined to do so. Alpine's claim was filed approximately thirty-five months after the date on which the District Court held that the claim accrued. For the first time, the City asserted I.C. §50-219 as a bar to the claim. The only difference between the claims regarding which the City waived I.C. §50-219 and Alpine's claim is that the other claimants paid their money to the City, while Alpine's money was paid to a third party. However, the City does not assert this distinction as the basis for the disparate treatment. Instead, the City claims that Alpine received the equivalent of a full refund when the City released the community housing restrictions on the Timbers units more than seventeen months after Alpine's purchase of the Timbers complex.

This proposition belies the fact that the City temporarily invaded and possessed two of Alpine's constitutionally protected property rights; namely, Alpine's money and Alpine's right to freely exclude people from and dispose of its property. Having done so, as the U.S. Supreme Court held in *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304, 321, 107 S.Ct. 2378, 2389, 96 L.Ed. 2d 250 (1987), "[W]here the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." Alpine has not received one dime of compensation from the City for these takings.

In any event, the City's arguments miss the essence of Alpine's equal protection claim. The issue is whether the City has offered any rational basis for waiving I.C. §50-219 as to all of the other claimants under the unconstitutional companion Ordinances 819 and 820 and allowing those claimants up to forty-three months after the accrual of their claims to notify the City,

while asserting that Alpine's claim must have been filed within 180 days after its accrual. The answer is that the City has not offered any basis for the disparate treatment, instead continuing to deny that it occurred. The issue is not *how* the City would have responded to Alpine's state takings claim, but *why* Alpine was not afforded the same latitude in asserting it.

B. Alpine's estoppel claim.

The City argues that "[E]stoppel cannot operate to grant subject matter jurisdiction, which, as we have noted above, is lacking here." *Respondent's Brief* at 17. The City cites *City of Eagle v. Idaho Department of Water Resources,* 150 Idaho 449, 247 P.3d 1037 (2011) in support of this proposition. This is the classically circular argument. The very reason why Alpine's estoppel argument can and should be considered is that neither I.C. §50-219 nor I.C. §6-908 are jurisdictional. The estoppel argument does not grant subject matter jurisdiction, it prevents the City from inequitably asserting a procedural statute as a bar in this case. The *City of Eagle* case is entirely consistent with Alpine's position. Therein, this Court held that the doctrine of quasi-estoppel could not be applied to extend the 28-day period for appeal of an administrative decision, because the 28-day appeal period was a jurisdictional requirement under I.R.C.P. 84(n). The critical distinction in *City of Eagle* is that I.R.C.P. 84(n) provides that: "The failure to physically file a petition for judicial review or cross-petition for judicial review with the district court within the time limits prescribed by statute and these rules *shall be jurisdictional and shall cause automatic dismissal of the petition for judicial review. . . .*"(emphasis added). No such language exists either in I.C. §50-219 or I.C. §6-906.

Once again, the City elects to mischaracterize Alpine's estoppel argument, rather than addressing its merits. The City suggests that "Alpine contends that the City changed its position by refunding money it collected under Ordinance 820 while declining to further reimburse Alpine after releasing it from restrictions imposed under Ordinance 819." *Respondent's Brief* at 18. The issue presented by Alpine's estoppel argument is not whether the City's denial of Alpine's claim constituted an impermissible change of position, but, rather, whether the City should be estopped from changing its position as to whether it would assert I.C. §50-219 as a bar to claims resulting from the City's imposition of the community housing ordinances.

Next, the City invites this Court to adopt the proposition that it is Alpine who changed its position, arguing that: "As shown in an e-mail from counsel for Alpine to the City on April 26, 2008 (two days after the City repealed Ordinance 819), *Alpine sought nothing more than a release of the housing restrictions on the Timbers*..." (emphasis added). *Respondent's Brief* at 18. The e-mail in question states in pertinent part as follows:

> Lindley,
> I am assuming that, given the Mountain Central Board of Realtors Decision and the subsequent repeal of Ordinance No. 819, the City is prepared to release Alpine Village from its community housing plan. Toward that end, I have attached a "First Amendment to Development Agreement" which does so.

R., Vol. III, p. 422.

Alpine was obviously obliged to seek a release of the community housing restrictions on the Timbers units, as part of Alpine's duty to mitigate its damages. There is nothing in the subject e-mail which justifies the City's suggestion that the release made Alpine whole, or that

the release is all that Alpine was seeking, or that Alpine stated any position in the e-mail which has changed.

Lastly, the City argues that Alpine has not shown that it relied to its detriment on the City's waiver of I.C. §50-219 in the fifty-eight other claims made after the community housing ordinances were declared unconstitutional and invalid on their face. The City does not cite any authority for the proposition that reliance is an element of a claim of quasi estoppel. That is because it is not.[8]

The undisputed facts of this case demonstrate that Alpine did no more than comply in good faith with the non-discretionary city ordinances which applied to its applications. Alpine proposed a less intrusive community housing plan which would not have required it to acquire or build any community housing units prior to the outcome of the Mountain Central Board of Realtors litigation. That plan was rejected by the City. The City had control of this process at every turn and called the shots. Alpine had no way of knowing whether that litigation would last months or years, what the decision of the District Court would be, or that the City would elect not to appeal the adverse District Court decision. After the Ordinances were invalidated, the community housing restrictions were released and Alpine had the opportunity to evaluate the mess with which it was left, it filed a claim with the City that was every bit as timely as the other claims which were filed with and paid by the City. The only reason that the City then, for the first time, asserted I.C. §50-219 as a bar to the claim is that the City fears the claim will be substantially larger than the other claims which the City has accepted and paid. To allow the

City to isolate Alpine's claim under these facts would be unconscionable; and, the City has not offered this Court any legitimate basis to hold otherwise.

IV. Alpine's state takings/inverse condemnation claim was timely filed under I.C. §5-224.

The City, for the first time in this litigation, asserts that I.C. §6-911 *might* be the governing statute of limitations in this case. *Respondent's Brief* at 19. This is in direct conflict not only with the precedent established by this Court but with the positions taken by the City throughout this litigation. In the *City's Opening Brief in Support of Motion to Dismiss*, filed in the United States District Court after the City removed the case to federal court, the City asserted that "Alpine's state takings claim is subject to Idaho's residual four-year statute of limitations, Idaho Code §5-224." R., Ex. II (Ex. 24, p.7). This position was repeated by the City after the case was remanded, in the *City's Opening Brief in Support of Motion for Summary Judgment* (R., Vol. II, p. 317) and in *City's Reply Brief in Support of Motion for Summary Judgment and Response Brief in Opposition to Alpine's Motion for Summary Judgment* (R., Vol. III, p. 440). The City was correct in these assertions. The Statute of Limitations which applies to Alpine's state constitutional claim is I.C. §5-224.[9]

The City contends that Alpine's state cause of action accrued on the day that Alpine filed its Applications. Contrary to the City's statement that this position is supported by a "mountain of appellate precedent" (*Respondent's Brief* at 20), just the opposite is true. As Alpine discussed in its *Opening Brief*, this Court has stated in numerous decisions that a takings/inverse

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[8] See *Willig v. State Dept. of Health & Welfare,* 127 Idaho 259, 261, 899 P.2d 969, 971 (1995).
[9] *McCuskey v. Canyon County Com'rs*, 128 Idaho 213, 217, 912 P.2d 100, 104 (1996).

condemnation cause of action accrues "after the full extent of the impairment of the plaintiffs' use and enjoyment of [the property] becomes apparent." *Tibbs v. City of Sandpoint,* 100 Idaho 667, 671, 603 P.2d 1001, 1005 (1979) (quoting *Aaron v. United States,* 311 F.2d 798, 802, 160 Ct.Cl. 295 (1963)). It is important to recognize that in *Tibbs*, this Court was also deciding when damages in an inverse condemnation case accrued, "both the extent and the measure of damages, are inextricably fixed by a finding of the time of taking." *Tibbs,* 100 Idaho at 670, 603 P.2d at 1004. The *Tibbs* Court concluded that the time of the taking, the accrual of the taking claim, and the time from which to measure a plaintiff's damages, although not readily susceptible to exact determination, must all be fixed at the point in time at which the impairment, *of such a degree and kind as to constitute a substantial interference with plaintiffs' property interest,* became apparent. The City's entire argument on this issue extracts the word "apparent" but attaches it to a completely different concept, arguing that, when Alpine filed its application, it was "apparent" that it might somehow be impacted by Ordinance 819. That is simply not the standard in Idaho for determining the accrual date of a takings claim such as the claim being asserted by Alpine.

The undisputed facts of this case support the District Court's holding that Alpine's state takings/inverse condemnation claim accrued on December 13, 2007, when the Development Agreement for Alpine Village was signed, dedicating all seventeen of the Timbers units as community housing units for Alpine Village. R., Vol. III, p. 528. When Alpine filed its Applications, it simply could have had no idea of how Ordinance 819 would be applied to its project. The Ordinance had only been recently enacted and had no history of application to development applications. The impact on Alpine of its initially proposed Community Housing

Plan bears no resemblance to the impairment of Alpine's property interests which resulted from the Plan which Alpine was required to propose, after its initial Plan was rejected. Under Ordinance 819, only the City Council had authority to review and approve a Community Housing Plan. Alpine's applications did not even reach the City Council until December 13, 2006, when the City Council conducted its first public hearing on the project; and, even then, the Council deferred consideration of the Plan until Alpine's Final Plat was submitted. R., Ex. II (Ex. 9, p.3, Finding No. 18 and p. 6, Conclusion No. 2.12). The Final Plat and the revised Community Housing Plan for the project were not reviewed and approved by the Council until August 23, 2007. R., Ex. II, (Ex. 15). Throughout this period of time, the Council was determining how it would proceed in light of the *Mountain Central Board of Realtors* litigation, whether it would continue to process Alpine's Applications and whether it would continue to impose the Ordinance on Alpine. The unusual factual record in this case belies any credible argument that, when Alpine filed its Applications, it could have had any clear understanding of how its property interests would ultimately be affected by the application of the Ordinance.

The City has cited *McCuskey* for the proposition that Alpine's claim accrued on the date on which Alpine first filed its applications with the City, because Ordinance 819 was then in effect. However, *McCuskey* simply does not support this argument. A review of the facts of *McCuskey* helps explain why. McCuskey acquired the subject property in 1978. A year later, Canyon County adopted an ordinance which had the effect of "down zoning" McCuskey's property. Seven years later, in 1986, McCuskey obtained a building permit for a use which does not appear to have been allowed by the County's zoning ordinance. The County promptly issued

a stop work order. McCuskey sued (but did *not* allege a taking or inverse condemnation), and in 1993 the Supreme Court held that the subject zoning ordinance was void (the *McCuskey I* decision). Then, in 1994, McCuskey filed an inverse condemnation action against the County. The Supreme Court held that the inverse condemnation action accrued not when the "down zone" ordinance was adopted (in 1979) and not when *McCuskey I* was decided (in 1993), but, rather, when the stop work order was issued, reasoning that:

> [T]his Court has decided that damages for inverse condemnation should be assessed at the time the taking occurs. *Tibbs v. City of Sandpoint,* 100 Idaho 667, 670, 603 P.2d 1001, 1004 (1979) (*citation omitted).* The time of taking occurs, and hence the cause of action accrues, as of the time that the full extent of the plaintiff's loss of use and enjoyment of the property becomes apparent. *Intermountain West,* 111 Idaho at 880, 728 P.2d at 769 (citing *Tibbs,* 100 Idaho at 671, 603 P.2d at 1005).

McCuskey, 128 Idaho at 217, 912 P.2d at 104.

If Alpine was arguing that its inverse condemnation action did not accrue until the *Mountain Central Board of Realtors* decision was issued, the City's citation of *McCuskey* would be appropriate. However, that is not Alpine's position. Consistent with *McCuskey,* Alpine is arguing that its inverse condemnation action accrued *not* on the date that Ordinance 819 was adopted and *not* on the date on which the *Mountain Central Board of Realtors* decision was issued, but, rather, when the full extent of Alpine's loss of use and enjoyment of its constitutionally protected property rights became apparent. As the District Court held, this occurred on December 13, 2007, when Alpine executed the Development Agreement for Alpine Village, committing to dedicate the Timbers units as community housing units. Under the undisputed facts of record, the *earliest* that this could be said to have occurred was on March 22,

2007 when, *for the first time,* Alpine's proposed acquisition and dedication of the Timbers units as community housing units for Alpine Village was approved by the City Council. In either case, Alpine's filing of its Complaint on December 10, 2010 was well within the allowable four-year statute of limitations.

V. The City's contentions that Alpine failed to properly exhaust its administrative remedies and that Alpine's actions were "voluntary" are without merit.

A. The voluntariness claim.

Citing *KMST, LLC v. County of Ada,* 138 Idaho 577, 67 P.3d 56 (2003), the City argues that Alpine's expenditure of in excess of two million dollars to acquire the Timbers complex and acceptance of severe restrictions on its ownership rights were "voluntary", thereby relieving the City of any liability. At the outset, it is noteworthy that, when advancing its statute of limitations arguments, the City repeatedly characterizes Ordinance 819 as imposing mandatory and non-discretionary community housing requirements on Alpine. The City then reverses its position and argues that Alpine somehow could have refused to comply with this mandatory and non-discretionary ordinance and that Alpine's failure to do so results in its compliance with the Ordinance having been "voluntary". In any event, the facts of *KMST* bear no resemblance to the facts of this case.

In *KMST*, the Court found that the Ada County Highway District Staff had no authority to impose upon *KMST* the condition that a new road be constructed as part of the proposed development. *KMST,* 138 Idaho at 582, 67 P.3d at 61. In other words, the Court found that there was no ordinance or statutory requirement that KMST dedicate or construct the road in question.

Instead, the Court cited the District Court finding that "representatives included the construction and dedication of Bird Street in the application because they were concerned that failing to do so would delay closing on the property and development of the property." *Id.*

In contrast to *KMST*, it is indisputable that Alpine's development applications were subject to Ordinance 819 and that, as the City readily concedes elsewhere in its Brief, Alpine's compliance with Ordinance 819 was mandatory. The Ordinance was in place when Alpine filed its Applications. By its terms, the Ordinance was not discretionary and Alpine Village clearly fell within its purview because the project consisted predominantly of "residential units". Both the McCall Planning and Zoning Commission and the McCall City Council found that the Applications were subject to the requirements of the Ordinance. The City Council required, as a condition of approval, that Alpine present a final Community Housing Plan with its Final Plat and that the Plan be incorporated into a recorded Development Agreement. When the *Mountain Central Board of Realtors* lawsuit was filed, the City elected to continue to apply the Ordinance to the Alpine Village Applications rather than to suspend it. The City rejected Alpine's initial plan to utilize property which it already owned to satisfy the off-site community housing component and required Alpine to identify its' off-site community housing units. The City was specifically aware that Alpine was acquiring the Timbers units solely to comply with the requirements of the Ordinance. The City's assertion that Alpine's compliance with Ordinance 819 was "voluntary" is completely unsupported by the undisputed facts of record.

B. The exhaustion argument.

The City also contends that Alpine failed to exhaust its administrative remedies by failing to inform the City that Ordinance 819 was unlawful or seek an amendment to the Development Plan as provided in the McCall City Code §3.10.12. Both arguments should be rejected. As to Alpine's supposed obligation to inform the City that the Community Housing Ordinance was unlawful, the City conveniently neglects to point out that, prior to the City Council's very first review and consideration of Alpine's Applications, the Mountain Central Board of Realtors had initiated its litigation against the City, challenging the very authority of the City to impose the Community Housing requirements. The City Council was, thus, fully on notice that its Ordinances might be unlawful before it began its review of the Applications. Citing the *Mountain Central Board of Realtors* litigation, the City declared a moratorium on all new land use applications and building permits pending the outcome of the litigation. In further recognition of the *Mountain Central Board of Realtors* litigation, the City required a limited release of claims to be included in Alpine's Development Agreement with City. However, the City did not take any of the steps that could have prevented this litigation, such as accepting Alpine's initially proposed and less intrusive Community Housing Plan or suspending the application of the Ordinance to Alpine's Applications. On the other side of the table, Alpine had invested significant time and financial resources in the Applications. It had attempted without success to gain approval of a much less intrusive Community Housing Plan, which would have deferred any property acquisitions until well after the conclusion of the *Mountain Central Board of Realtors* litigation. It had absolutely no way of knowing how long that litigation would drag

on. Alpine was offered only two choices by the City: abandon its Applications, or comply with the Ordinance by putting forth a plan which designated all of the required community housing units for all phases of the Alpine Village Project. Given these facts, it is disingenuous of the City to suggest that Alpine was legally obligated to "proceed under protest". Simply put, the City was well aware of the risk it was taking.

The City also argues that Alpine failed to exhaust its administrative remedies by not seeking an amendment under the McCall City Code §3.10.12.[10] This Code section allows a party to seek an amendment to a "Final Development Plan" after the Plan has received final approval. The Final Development Plan is part of the Planned Unit Development approval process under Title 3 of the McCall City Code. As such, it is distinct and separate from the Subdivision approval process, which is provided for in Title 9 of the Code, in which the Community Housing Ordinances were contained. The City is apparently confusing the PUD Final Development Plan with the Alpine Village Development Agreement. The Community Housing requirements which are at the heart of this action were triggered by Alpine's subdivision applications (i.e. preliminary and final plat) and were memorialized in the Development Agreement between the City and Alpine. The Development Agreement was required by McCall City Code §9.6.06[11]. In sum, McCall City Code §3.10.12 has nothing to do with the community housing requirements of the McCall City Code or the Development Agreement in which Alpine's Community Housing Plan was memorialized. As such, no amount of amendments to the PUD Final Development Plan could have relieved Alpine from the mandatory Community Housing requirements.

In its *Appellant's Brief*, Alpine asserts that, in any event, Alpine was exempt from any exhaustion requirements because the City clearly acted outside its authority in requiring compliance with the requirements of the Community Housing Ordinances. The City acknowledges that there is an exception to the exhaustion of administrative remedies requirement when an agency has acted outside its authority. *Respondent's Brief* at 25. However, the City then argues that, "A review of this Court's decisions strongly suggest that this exception applies only to facial challenges." *Id.* That broad assertion is not well taken. [12] Moreover, it is important to recognize the one significant fact which distinguishes this case from those cited by the City on this issue; namely, that the law of this case is that the City clearly acted outside of its authority and arbitrarily and capriciously in imposing the Community Housing Ordinances on Alpine. In the *Mountain Central Board of Realtors* final decision, the District Court found that the Community Housing Ordinances attempted to regulate a landowner's ownership rather than use of property, that the City lacked authority to impose the Ordinances, and that the Ordinances were an arbitrary and unreasonable exercise of the City's police powers. The City concedes that when an agency strays outside of its authority, the action may be challenged without exhaustion.[13] This issue has been fully and finally resolved against the City and is the law of this

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[10] Section 3.10.12 of the McCall City Code is attached hereto as Addendum 1.
[11] Section 9.6.06 is part of Title 9 "Subdivisions" and is attached hereto as Addendum 2.
[12] See, for example, *Lochsa Falls, L.L.C. v. State*, 147 Idaho 232, 207 P.3d 963 (2008). Locsha Falls brought constitutional challenges to certain IDT regulations, which the District Court dismissed for the failure of Loscha Falls to exhaust its administrative remedies. The Supreme Court considered Lochsa Fall's "outside agency authority" exemption to the exhaustion requirement, even though the court characterized the constitutional taking challenges as "as applied" challenges.
[13] *Respondent's Brief* at 26.

case. This fact alone distinguishes this case and suggests that the "outside agency authority" exemption would apply to Alpine's claims.

VI. Alpine was not required to seek judicial review of the City's approval of its applications under the Local Land Use Planning Act.

I.C. §67-6521(2)(b) states as follows:

> (b) An affected person claiming "just compensation" for a perceived "taking," the basis of the claim being that a final action restricting private property development is actually a regulatory action by local government deemed "necessary to complete the development of the material resources of the state," or necessary for other public uses, may seek a judicial determination of whether the claim comes within defined provisions of section 14, article I, of the constitution of the state of Idaho relating to eminent domain. Under these circumstances, the affected person is exempt from the provisions of subsection (1) of this section and may seek judicial review through an inverse condemnation action specifying neglect by local government to provide "just compensation" under the provisions of Section 14, Article I, of the Constitution of the State of Idaho and Chapter 7, Title 7, Idaho Code.

The City argues that I.C. § 67-6521(2)(b) does not exempt Alpine from the obligation to seek judicial review under I.C. §67-6521(1). In support of this position, the City relies upon the holding in *KMST, LLC v. County of Ada*. Such reliance is misplaced. In *KMST*, the District court addressed *KMST's* claim that the developer's dedication of a street and the later imposition by the Ada County Highway District of impact fees constituted a taking. The District Court accepted KMST's argument that I.C. §67-6521(2)(b) exempted KMST from exhausting its administrative remedies before judicially challenging the Highway District's calculation of the fees. This Court disagreed, holding:

> By its terms, that statute [§ 67-6521(2)(b)] has no application to the impact fees imposed in this case. It only applies if the basis of the inverse condemnation claim is "that a specific zoning action or permitting action restricting private property development is actually *a regulatory action by local government* deemed

> 'necessary to complete the development of the material resources of the state,' or necessary for other public uses." (emphasis added).

KMST 138 Idaho at 584, 67 P.3d at 63.

As this Court clearly stated in the *KMST* decision, the Highway District had no authority to approve or reject the developer's application or to impose any conditions of approval on the application. The proposed street dedication was found to be a completely voluntary action by the developer. Moreover, the Highway District's Ordinance which authorized the imposition of impact fees provided an administrative procedure for challenging those fees. In this case, the City clearly had final authority over Alpine's Applications and its imposition of the Community Housing Ordinance on Alpine as a mandatory and non-discretionary condition was clearly part of its regulatory process. Additionally, under the Local Land Use Planning Act, only cities and counties are "local governments."[14] Thus, this Court's holding in *KMST* that the judicial review exemption of I.C. §67-6521(2)(b) was not applicable to the ordinances of a highway district is not surprising on this basis alone. In any event, the plain language of I.C. §67-6521(2)(b) does make the exemption applicable to the regulatory actions of the City of McCall in this case; and, the *KMST* decision is in accord with that conclusion.

The City further argues that I.C. §67-6521(2)(b) is aimed at facilitating only taking challenges that are based on the allegation that the taking was not for a legitimate public use, which, by inference, would not include Alpine's takings claim. *Respondents Brief* at 12, fn. 8. In support of this interpretation of the statute, the City claims that the statutory language of I.C.

[14] I.C. §67-6503. Every city and county shall exercise the powers conferred by this chapter.

§67-6521(2)(b) is "obtuse" and that this Court should therefore resort to the Statute's legislative history for clarification. To the contrary, the language of I.C. §67-6521(2)(b) is clear and unambiguous and as such, resort to legislative history is neither required nor appropriate.

> It is well established that where statutory language is unambiguous, legislative history and other extrinsic evidence should not be consulted for the purpose of altering the clearly expressed intent of the legislature. *(citing Verska v. Saint Alphonsus Reg'l Med. Ctr.,* 151 Idaho 889, 893, 265 P.3d 502, 506 (2011).

Peck v. State, Dept. of Transp., 278 P.3d 439, 448 (Idaho Ct. App. 2012).

Nothing in the language of I.C. §67-6521(2)(b) remotely suggests that the judicial review exemption of the Statute is limited to taking claims alleging the taking is not for a legitimate public use. The Statute's language clearly exempts those claims for compensation for a taking based upon a regulatory action by a local government deemed necessary for a public use. It is undisputed that the Community Housing Ordinance was a regulatory action deemed necessary by the City for a public use. It is further undisputed that the second Amended Complaint of Alpine Village alleges a cause of action against the City claiming compensation for a taking under the provisions of Section 14, Article I of the Constitution of the State of Idaho. As such, I.C. §67-6521(2)(b) exempts Alpine from the requirements of judicial review required by I.C. §67-6521(1) and permits Alpine's judicial review through a direct action for inverse condemnation.

VII. Alpine's takings claims under the Fifth Amendment to the U.S. Constitution satisfy the ripeness requirements of *Williamson County Reg'l Planning Commission v. Hamilton Bank of Johnson City.*[15]

The City correctly argues that the ripeness tests which were articulated by the U.S. Supreme Court in the *Williamson County* decision are applicable exclusively to Alpine's federal

takings claims. *Williamson County* established a two pronged ripeness test. The first prong requires that the decision of the governing body being challenged be a "final decision". The second prong requires that Alpine have sought and been denied compensation under a state constitutional inverse condemnation claim. Alpine's federal claim meets both ripeness tests.

A. The "final decision" requirement.

The City's argument regarding the "final decision" ripeness requirement appears to be that, first, Alpine's acquisition of the Timbers complex and compliance with Ordinance 819 was "voluntary" and, second, that Alpine failed to "probe alternatives to proceeding with the Timbers..." *Respondent's Brief* at 30-32. The fundamental factual and legal flaws in the City's continued and inconsistent assertion that Alpine's compliance with the Ordinance was "voluntary" have been discussed above and will not be repeated here.[16] The assertion that Alpine failed to probe alternatives to the acquisition of the Timbers is unequivocally false.

Alpine initially submitted a Community Housing Plan which proposed to construct some units on-site and to convert mobile home rental spaces already owned by Alpine to rent restricted spaces on an "interim" basis. The Plan proposed to replace those mobile home spaces with permanent off-site units within three years after Phase 3 of the Alpine Village project was final platted. R, Ex. II (Ex. 4). Under this Plan, none of the on-site units would have been constructed and no permanent off-site units would have been acquired or constructed until after the conclusion of the *Mountain Central Board of Realtors* litigation. As the City acknowledges in its *Respondent's Brief*, that Plan was rejected by the City. *Respondent's Brief* at 9. Alpine was

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[15] 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985)

directed to present a new Plan which designated the permanent off-site units. It is difficult to reconcile the City's argument that Alpine failed to probe alternatives to the acquisition of the Timbers with these uncontroverted facts. To the extent that the "final decision" prong of *Williamson County* did, in fact, require Alpine to probe alternative and less intrusive means of compliance with the mandatory requirements of Ordinance 819, which is far from clear, Alpine unquestionably did so. When its attempts were rebuffed by the City, it proposed a Plan which fell squarely within the express parameters of Ordinance 819.[17]

B. Alpine has properly sought compensation under the Article 14, Section 1 of the Constitution of the State of Idaho, in satisfaction of the second *Williamson* ripeness test.

The City argues that Alpine has failed to meet the second prong of *Williamson County* because Alpine failed to seek judicial review under the Local Land Use Planning Act within 28 days after the project received final approval from the City and because Alpine's state takings

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[16] See discussion above at Section V.

[17] The City appears to acknowledge that a variance from the requirements of Ordinance 819 was not available to Alpine. Instead, the City's argument is that the "failure to probe alternatives" is analogous to the failure to seek a variance which was the case in *Williamson.* In any event, Alpine concurs that neither the McCall City Code, nor the Local Land Use Planning Act would have allowed a variance from the requirements of Ordinance 819 to be granted. The term "variance" as utilized in a land use/zoning context is limited in scope and would not be a proceeding available to Alpine to seek relief from the Community Housing requirements mandated by City. Under the Local Land Use Planning Act, a variance is limited to matters relating to the size and setbacks of lots, heights of buildings or provisions affecting the size, shape or placement of structures on a lot. I.C. §67-6516. ". . . A variance is a modification of the bulk and placement requirements of the ordinance as to lot size, lot coverage, width, depth, front yard, side yard, rear yard, setbacks, parking space, height of buildings, or other ordinance provision affecting the size or shape of a structure or the placement of the structure upon lots, or the size of lots." Likewise, the McCall City Code defines variance as "The relaxation of an otherwise applicable dimensional requirement." McCall City Code §3.3.02. The McCall City Code also restricts the types of variances authorized. McCall City Code §3.13.012 "(C) Modification Of Requirements: A variance may be granted modifying the requirements of this title respecting: lot width; lot depth; front, side, and rear yard setbacks; lot coverage; parking space; height of buildings; or other ordinance provisions affecting the size or shape of a structure or the placement of the structure upon lots, or the size or shape of lots. A variance may not be used to authorize a land use not otherwise allowed in the applicable zone or to increase the density of development beyond that which is authorized in the comprehensive plan."

claim was not timely filed. Both of these arguments have been addressed in Alpine's *Appellant's Brief* and above in this *Appellant's Reply Brief*.[18] Alpine has, in fact, proceeded in strict compliance with the U.S. Supreme Court's decision in *San Remo Hotel, L.P. v. City and County of San Francisco, et al.*, 545 U.S. 323, 125 S. Ct. 2491, 162 L. Ed. 2d 315 (2005). Alpine has joined its state inverse condemnation/takings claim with its federal takings claims. In the event that compensation is denied to Alpine under the state claim, the federal claims will become ripe.

VIII. Alpine's federal takings claims are timely under I.C. §5-219(4).

The City's strained and tortuous argument that Alpine's federal claims are untimely turns on the assertion that the Ninth Circuit Court of Appeals' decisions in *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 687 (9th Cir. 1993) and *Hacienda Valley Mobile Estates v. City of Morgan Hill*, 353 F.3d 651 (2003) apply only to causes of action filed in federal court. According to the City, this is the "precise holding of *San Remo*." *Respondent's Brief* at 40. To the contrary, there is no support in the *San Remo* decision for this proposition. This was recognized by the District Court when it rejected this very argument. This was also recognized by the Honorable B. Lynn Winmill, Chief United States District Judge, who in his Decision remanding this case reasoned that:

> The accrual of a federal takings claims turns on the exhaustion of state remedies: "[T]he date of accrual is either (1) the date compensation is denied in state courts, or (2) the date the ordinance is passed if resort to state courts is futile." *Hacienda Valley Mobile Estates v. City of Morgan Hill*, 353 F.3d 651 (2003), (citing *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 687 (9th Cir. 1993)). There is no contention that the exhaustion requirement is futile here. Therefore, Alpine

[18] See *Appellant's Brief* at 16-29; See discussion at Sections IV and VI above.

> Village's federal claim does not accrue until compensation is denied in state court, and it appears that the statute of limitations has not yet begun to run.

R., Ex. II (Ex. 29, at p. 6).

In an accompanying footnote, Judge Winmill specifically rejected the argument being made by the City in this appeal:

> The City argues that *Hacienda Valley Mobile Estates* and *Levald* apply only "with respect to a federal claim brought first in federal court." (cite omitted). But the Ninth Circuit's rationale is at least as strong in the context of a state case removed to federal court. *Id.* at fn. 2.

The precise argument being made by the City herein was also rejected by the United States District Court for the Western District of Washington in the post-*San Remo* decision, *Olhausen v. City of Sammamish*, 2011 Westlaw 683902. Therein, the property owner spent three years litigating its state takings claim. After ultimately been denied compensation under the state claim, the property owner then initiated a federal takings claim in federal court. The District Court rejected the City's argument that the claim accrued when the property owner's subdivision application was denied and that, therefore, the applicable three year statute of limitations on the federal takings claim had run. Citing *Levald,* the District Court held that the federal claim did not accrue until compensation was denied in the state court proceedings.

After removing this case to federal court and in its briefing in opposition to Alpine's motion to remand the case, one of the arguments offered by the City against remand was that remand to state court "would risk misapplication of controlling federal law." R., Ex. II (Ex. 27, at pp. 1, 5). In its arguments regarding the application of I.C. §5-219(4) to Alpine's federal takings claims, it would appear that this is precisely what the City is inviting this Court to do.

IX. The City's actions effectuated a temporary taking for which Alpine is entitled to receive compensation.

The City acknowledges in its *Respondent's Brief* that temporary takings claims are recognized by the Idaho Courts[19] and the United States Supreme Court.[20] However, citing *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002) and *Moon v. North Idaho Farmers Ass'n,* 140 Idaho 536, 96 P.3d 637 (2004), the City argues that temporary takings are limited only to situations in which there is a "total deprivation" of all use of the property.[21] Although this limitation may apply to certain types of takings claims, it is inapplicable to Alpine's claim.

Tahoe-Sierra presented the question of whether a moratorium on development imposed during the process of devising a comprehensive land-use plan for Lake Tahoe constituted a *per se* taking of property requiring compensation under the Fifth Amendment of the United States Constitution. The court was, thus, presented with a *Lucas* regulatory taking case regarding which the Court held, "[t]he categorical rule that we applied in *Lucas* states that compensation is required when a regulation deprives an owner of "*all* economically beneficial uses" of his land. *Id.,* at 1019, 112 S. Ct. 2886". *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency,*

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[19] *McCuskey v. Canyon County Comm'rs,* 128 Idaho 213, 912 P.2d 100 (1996). McCuskey claim for temporary taking arose between the time a stop work order requiring McCuskey to cease construction of a convenience store was issued and the time the Court declared invalid, the county ordinance that the stoop work order was based upon.

[20] *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304,319, 107 S.Ct. 2378, 2388, 96 L.Ed. 2d 250 (1987) "If a regulation of private property that amount to a taking is later invalidated, this action converts the taking to a "temporary" one for which the government must pay the landowner forth value of the use of the land during that period"

[21] See *Respondent's Brief* at 45 citing as authority *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002).

535 U.S. 302, 330, 122 S.Ct. 1465, 1483, 152 L. Ed. 2d 517 (2002.)[22] In *Moon,* this Court was also presented with a *Lucas* regulatory taking.

> The taking asserted then, is in the nature of a regulatory taking, but the plaintiffs have not claimed a permanent deprivation of all economically beneficial uses of their land. As such, under the Idaho Constitution, which does not allow less than a total deprivation of use or denial of access, and under *Lucas,* 505 U.S. 1003, 112 S. Ct. 2886, 120 L.Ed.2d 798, there is no taking in violation of the state or the federal constitution. *See also Tahoe–Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, et al.,* 535 U.S. 302, 122 S.Ct. 1465, 152 L.Ed.2d 517 (2002).

Moon v. N. Idaho Farmers Ass'n, 140 Idaho 536, 542, 96 P.3d 637, 643 (2004).

While these decisions may, indeed, be relevant to *Lucas* takings claims, what the City fails to recognize is that Alpine has not asserted a *Lucas* takings claim. Rather, Alpine has suffered a *Loretto, per se* physical taking.[23] This is a very important distinction, the significance of which was acknowledged in both the *Tahoe-Sierra* and *Moon* decisions.

In *Tahoe-Sierra,* the court recognized that *per se Loretto* taking claims require an entirely different analysis from those raised under *Lucas*:

> When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner, *United States v. Pewee Coal Co.,* 341 U.S. 114, 115, 71 S.Ct. 670, 95 L.Ed. 809 (1951), regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof. Thus, compensation is mandated when a leasehold is taken and the government occupies the property for its own purposes, even though that use is temporary. *United States v. General Motors Corp.,* 323 U.S. 373, 65 S.Ct. 357, 89 L.Ed. 311 (1945); *United States v. Petty Motor Co.,* 327 U.S. 372, 66 S.Ct. 596, 90 L.Ed. 729 (1946). Similarly, when the government

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[22] See *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992). *Lucas* was a regulatory action deemed to be a per se taking where regulations completely deprive an owner of all economically beneficial use of property,

[23] *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440, 102 S. Ct. 3164, 3178, 73 L. Ed. 2d 868 (1982). *Loretto* holds that a regulation that authorizes a physical occupation of property by third parties is a taking.

> appropriates part of a rooftop in order to provide cable TV access for apartment tenants, *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982); or when its planes use private airspace to approach a government airport, *United States v. Causby,* 328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed. 1206 (1946), it is required to pay for that share no matter how small. . . .
>
> This longstanding distinction between acquisitions of property for public use, on the one hand, and regulations prohibiting private uses, on the other, makes it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a "regulatory taking," and vice versa. For the same reason that we do not ask whether a physical appropriation advances a substantial government interest or whether it deprives the owner of all economically valuable use, we do not apply our precedent from the physical takings context to regulatory takings claims.

Tahoe-Sierra, 535 U.S. at 322.

Likewise in *Moon*, the alleged taking was a regulatory, *Lucas* type taking. In *Moon,* this Court expressly noted that a temporary physical, *Loretto* type taking is compensable whether or not it permanently deprives the property owner of all economically beneficial uses of the property.[24] Thus, the holdings in *Tahoe-Sierra* and *Moon* are not inconsistent with Alpine's position in this case.

The City next argues that no temporary taking occurred in this case because, "After all, Alpine still owns the Timbers, and the City acted promptly and without prodding to release Alpine from any requirements imposed in the development Agreements." *Respondent's Brief* at 44. This is the same argument which was rejected by the Supreme Court in *First English Evangelical Lutheran Church of Glendale v. Los Angeles County, Cal.,* 482 U.S. 304, 321, 107 S. Ct. 2378, 2389, 96 L. Ed. 2d 250 (1987), in which the Court held that, once a taking is

[24] See *Moon v. N. Idaho Farmers Ass'n*, 140 Idaho 536, 541-42, 96 P.3d 637, 642-43 (2004).

established, "no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective."

The City does not dispute that under *Loretto*, where government requires an owner to suffer a permanent physical invasion of its property, a *per se* taking will be deem to have occurred. Rather, the City simply argues that *Loretto* and *Kaiser Aetna*,[25] which were cited by Alpine, bear no resemblance to the taking which resulted from the application of Ordinance 819 to Alpine's project. *Respondent's Brief* at 46, and fn 36.

In *Loretto*, the United States Supreme Court held that a New York statute which provided that a landlord must permit a cable TV provider to install its cable TV facilities on the landlord's property and further provided that the landlord could not demand payment from the cable TV provider in excess of an amount deemed by a state commission to be reasonable, constituted a taking. The *Loretto* court recognized the historical and traditional view that a government regulation which authorized the occupation of property by a third party constituted a taking. The physical occupation condemned in *Loretto* as a *per se* taking consisted of the use of a small portion of a rooftop for the installation of cable TV facilities. By way of contrast, the protected property interests which were taken from Alpine consisted of Alpine's money, Alpine's right to dispose of its property, Alpine's right to freely exclude others from the property and to determine who will occupy the property.

[25] *Kaiser Aetna v. U. S.*, 444 U.S. 164, 100 S. Ct. 383, 62 L. Ed. 2d 332 (1979)

Likewise in *Kaiser Aetna,* the court found a taking where the government imposed a navigational servitude upon Kaiser Aetna's private waterway, thus creating an easement the public could enjoy. The court held,

> In this case, we hold that the "right to exclude," so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation. This is not a case in which the Government is exercising its regulatory power in a manner that will cause an insubstantial devaluation of petitioners' private property; rather, the imposition of the navigational servitude in this context will result in an actual physical invasion of the privately owned marina.

Kaiser Aetna, 444 U.S. at 179.

In both *Loretto* and *Kaiser Aetna*, the takings resulted from a regulation that subjected a property owner to a physical invasion by third parties of a fundamental property right. Conversely, regulations which merely regulate the *use of* property may not constitute a taking.

> Our holding today is very narrow. We affirm the traditional rule that a permanent physical occupation of property is a taking. In such a case, the property owner entertains a historically rooted expectation of compensation, and the character of the invasion is qualitatively more intrusive than perhaps any other category of property regulation. We do not, however, question the equally substantial authority upholding a State's broad power to impose appropriate restrictions upon an owner's *use* of his property.

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 441, 102 S. Ct. 3164, 3179, 73 L. Ed. 2d 868 (1982).

Despite the City's invitation to do so, it is not necessary or appropriate in this case to debate the issue of whether Ordinance 819 merely regulated Alpine's use of its property. That issue was resolved in the District Court's decision in *Mountain Central Board of Realtors* at pages 29 to 30:

> However, the City of McCall's requirement that twenty percent of new subdivisions be deed-restricted community housing regulates much more than a landowner's "use" of his or her property. The restrictions for community housing dictate the price for which the property may be sold and to whom the property may be sold...These restrictions go much further than merely regulating the use of property; instead they essentially regulate ownership of the property by dictating to whom a unit may be sold or rented.

Thus, as established by the decision in *Mountain Central Board of Realtors* the taking which occurred in this case falls squarely within the *Loretto per se* category of takings. In such case, the taking is compensable despite being only "temporary".[26]

X. Alpine did not release or waive its takings claims.

The City argues that Alpine has waived and released the City from the takings claims which are at issue in this case by means of the language in the Alpine Village Development Agreement. *Respondent's Brief* at 28. However, the language of the Development Agreement is clear and unambiguous. The City required Alpine to release only those claims "as to the Community Housing Units which are sold pursuant to this Plan prior to the final disposition of such litigation." R, Ex. II (Ex. 16, Section VII) (i.e. the *Mountain Central Board of Realtors* litigation). No units were sold prior to the final disposition of the litigation. This limited release is what was bargained for by the parties, with input and review by the City attorney. Having rejected Alpine's less intrusive Community Housing Plan and elected to continue to impose

[26] The City's reliance on *Yee v. City of Escondido,* 503 U.S. 519, 112 S.Ct. 1522 (1992) is also misplaced. The critical factual predicate of the Court's decision in *Yee* was that the property owners were not required to subject themselves to the Ordinance, in that the property owners were not required to rent to mobile home owners. Alpine, in contrast, had no such choice. The City controlled and dictated to whom Alpine could rent or sell the Timbers units and at what price.

Ordinance 819 on Alpine despite the *Mountain Central* challenge, the City was well aware of the risk which it was taking.

The City invites this Court to read language into the Release for which there is no basis in the document or in the record before the Court, suggesting in support of its argument that:

> The City reasonably relied on this language to protect it... Rather than delaying or denying pending applications, this language was intended to allow Applications like Alpine's to proceed without financial risk to the City. It is safe to assume that the City would have never entered into this contract and approved the project if it thought that Alpine reserved the right to sue the City despite the City's compliance with the terms of the deal.

Respondent's Brief at 29.

The City does not support these assertions with any cites to the record. That is because the record is devoid of any evidence which would substantiate any of these statements.

XI. The City's other equitable arguments are without merit.

At pages 41-43 of its *Respondent's Brief*, the City offers a veritable laundry list of additional equitable arguments as to why Alpine should be denied relief in this case. These arguments are premised on flawed factual assertions which are refuted by the record and have been addressed elsewhere in this Brief.

XII. The City is not entitled to an award of attorneys fees on appeal.

The City argues that, if it prevails in this litigation, it should be awarded its attorneys fees under I.C. §12-117 and 42 U.S.C.A. §1988. I.C. §12-117 provides for an award of fees only if the non-prevailing party's claims or causes of action were pursued without reasonable basis in fact or law. The Court of Appeals has held that: "Where questions of law are raised, attorney fees should be awarded under I.C. §12–121 only if the nonprevailing party advocates a plainly

fallacious, and, therefore, not fairly debatable, position."[27] Given the complexity of the legal issues presented by this case, and the uniqueness of the underlying facts, Alpine would respectfully submit that, regardless of the outcome of this appeal, it cannot be found that Alpine's position was pursued without reasonable basis in fact or law or that Alpine's positions were not, at a minimum, fairly debatable.[28] The District Court concurred. After this appeal was filed, the District Court entered its *Memorandum Decision on (1)Defendant's Memorandum of Costs and Attorneys Fees and (2) Plaintiff's Motion to Disallow Attorneys Fees and Costs.* Therein, the Court denied the City's Motion for an award of fees under I.C. §12-117, finding that Alpine had not pursued its claims without reasonable basis in law or fact. The District's Court's analysis and reasoning would be applicable to the City's request on appeal.

The City also references 42 U.S.C.A. §1988 as a basis for its request for fees, asserting that the standard under that statute is "functionally the same as I.C. §12-117". *Respondent's Brief* at 48. In fact, the standard for awards of attorneys fees under 42 U.S.C.A. §1988 to prevailing defendants is even more demanding even than the standard under I.C. §12-117, with something akin to frivolousness being the required finding.[29]

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[27] *Lowery v. Board of County Commissioners for Ada County,* 115 Idaho 64,69, 764 P.2d 431, 437 (Ct. App. 1988)

[28] After this appeal was filed, the District Court entered its *Memorandum Decision on (1) Defendant's Memorandum of Costs and Attorneys Fees and (2) Plaintiff's Motion to Disallow Attorneys Fees and Costs.* Therein, the Court denied the City's Motion for an award of fees under I.C. §12-117, finding that Alpine had not pursued its claims without reasonable basis in law or fact. No appeal has been taken from that decision, which is attached as Addendum 3.

CONCLUSION

For the reasons stated herein and in Alpine's *Appellant's Brief,* the District Court's Decision should be reversed and this case should be remanded to the District Court to determine the amount of compensation to which Alpine is entitled.

DATED this 17th day of July, 2012.

MILLEMANN, PITTENGER, McMAHAN & PEMBERTON, LLP

BY: _____
STEVEN J. MILLEMANN

BY: _____
GREGORY C. PITTENGER

CERTIFICATE OF MAILING / COMPLIANCE

The undersigned does hereby certify that the hard copy and the electronic copy of the brief submitted is in compliance with all of the requirements set out in I.A.R. 34 and I.A.R. 34.1, and that a hard copy and an electronic copy was mailed/served on each party at the following addresses:

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Dated and certified this 17th day of July, 2012.

By: _____
STEVEN J. MILLEMANN

[29] See *Bittner v. Sadoff & Rudoy Industries,* 728 F. 2d 820 (Seventh Cir. 1984); *Com v. Flaherty,* 40 F. 3d 57 (Third Cir. 1994); *U.S. v. State of Mississippi,* 921 F. 2d 604 (Fifth Cir. 1991).

Addendum 1

3.10.12: AMENDMENTS TO FINAL DEVELOPMENT PLAN:

(A) Subsequent Amendments:

1. Any subsequent amendment to the final development plan changing location, siting, and height of buildings and structures may be authorized by the commission, without additional public hearings, if required by engineering or other circumstances not foreseen at the time the final plan was approved.

2. In no case shall the commission authorize changes which may cause any of the following:

   (a) A change in the use or character of the development, including ownership.

   (b) An increase in overall coverage of structures or significant changes in types of structures.

   (c) An increase of the intensity of use or types of usage.

   (d) An increase in the problems of traffic circulation and public utilities.

   (e) A reduction of off street parking and loading space.

   (f) A reduction in required pavement widths.

(B) Change Requiring Public Hearing: All other changes in use, rearrangement of lots, blocks and building tracts, or in the provision of common open spaces and changes in addition to those listed above which constitute substantial alteration of the original plan shall require a public hearing before the commission and approval by the council.

(C) Expiration:

1. On the anniversary year after general development plan and program approval, until the project is complete, the applicants or applicants' successors, shall file a progress report. If substantial construction or development has not taken place within four (4) years from the date of approval of the general development plan and program, the commission shall review the PUD program at a public hearing to determine whether or not its continuation, in whole or in part, is in the public interest, and, if found not to be, shall recommend to the council that the PUD approval be revoked.

2. After action by the commission, the council shall consider the matter and by resolution accept or reject it or return it to the commission for further action. Notice and hearing shall be provided according to the same procedures as are then applicable to a new application, with the present owner of the property being sent notice by certified mail, return receipt requested; the city is entitled to rely on the county tax assessor's records

Addendum 1

and a title company title search for the name and address of the current owner(s). (Ord. 821, 2-23-2006, eff. 3-16-2006)

Addendum 2

9.6.06: DEVELOPMENT AGREEMENTS:

All provisions of this section, and sections 9.6.07, 9.6.08, 9.6.09 and 9.6.10 of this chapter are mandatory, and may not be altered by a development agreement. The obligations contained in these four (4) sections shall be enforceable by methods of enforcement of ordinances, as well as under the law respecting contracts; the doctrine of election of remedies shall have no application.

In addition to the objectives outlined in chapter 1 of this title, provisions to allow the city and developers to enter into development agreements are included in these subdivision regulations to achieve the following purposes:

(A) To assure the city and the applicant that the development will be of greater community benefit and that, in turn for providing needed facilities, improvements or services, the applicant will be able to plan for and proceed with development.

(B) To provide a procedure whereby developers of large scale and/or multi-use projects may continue with the development of such projects in accordance with the rules, regulations and policies of the city as such existed at the time the development agreement was adopted, notwithstanding subsequent changes in such rules, regulations, and policies which may occur during the time frame of the development agreement subject to and in compliance with conditions of approval.

(C) To enable the city to more accurately plan and budget for necessary public improvements in full confidence that development will proceed in a timely and phased manner in accordance with the provisions of the development agreement.

(D) To strengthen the public planning process, encourage private participation in comprehensive planning and reduce the economic costs of development. (Ord. 822, 2-23 -2006, eff. 3-16-2006)

Addendum 3

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF VALLEY

ALPINE VILLAGE COMPANY, an Idaho corporation, Plaintiff, vs. CITY OF MCCALL, Defendant.	Case No. CV-2010-519C MEMORANDUM DECISION ON (1) DEFENDANT'S MEMORANDUM OF COSTS AND ATTORNEY FEES (2) PLAINTIFF'S MOTION TO DISALLOW ATTORNEY FEES AND COSTS

APPEARANCES

For Plaintiff: Steven J. Millemann of Millemann Pittenger McMahan & Pemberton, LLP

For Defendant: Christopher H. Meyer of Givens Pursley, LLP

This matter came before the Court on (1) Defendant's Memorandum of Costs and Attorney Fees and Costs and (2) Plaintiff's Motion to Disallow Attorney Fees. By stipulation, the parties submitted their written arguments to the Court for decision without hearing.

BACKGROUND

This case arises from an application Plaintiff made to the City for a planned unit development ("PUD") and subdivision in McCall called Alpine Village. On February 23, 2006, the City of McCall, hereinafter referred to as "the City" passed Ordinance 819,

which required developers of residential subdivisions to set aside 20% of their planned units for "community housing", that is, restricted housing for low-income residents.

On June 20, 2006, Plaintiff filed their applications with the Planning and Zoning Commission seeking to develop a mixed use residential and commercial property (The "Alpine Village").

Meanwhile, Mountain Center Board of Realtors, Inc. had filed an action against the City of McCall in Valley County Case No. 2006-490-C, seeking the Court there to declare, inter alia, Ordinance 819 as facially unconstitutional (the "MCBR litigation").

On March 12, 2007, Plaintiff presented a revised community housing plan to the City Council wherein Plaintiff would elect to provide the off-site units by purchasing a 17-unit apartment complex known as "The Timbers" and converting the units into community housing condominiums. The McCall City Council approved the revised plan on March 22, 2007, Plaintiff closed on the purchase of The Timbers on April 16, 2007, and the parties entered into a Development Agreement with Plaintiff for Alpine Village on December 13, 2007.

On February 19, 2007, Fourth District Judge Thomas Neville ruled in the MCBR litigation that Ordinance 819, McCall City Code § 9.7.10., was an unconstitutional tax. Subsequent to that decision, the City entered into the First Amendment to Development Agreement on July 24, 2008, wherein the City deleted Article VII of the original development agreement and lifted the restrictions that Ordinance 819 had imposed upon Plaintiff's property at Alpine Village. The City further lifted the community housing restrictions on Plaintiff's property at The Timbers on May 21, 2009.

On November 15, 2010, Plaintiff sent a written demand letter to the City seeking

payment of damages it had incurred in purchasing The Timbers in order to comply with now invalidated Ordinance 819. The City did not respond to Plaintiff's demand, and Plaintiff commenced suit against the City in this case on December 10, 2010.

On December 16, 2011, this Court issued a Memorandum Decision on the parties' Motions for Summary Judgment and determined that I.C. § 50-219 barred Plaintiff's state inverse condemnation claim. The Court also found that Plaintiff's remaining federal claims were barred as unripe by either requirement set forth in *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S.Ct. 3108 (1985).

Following the entry of judgment dismissing Plaintiff's action, Defendant filed its Memorandum of Costs and Attorney Fees requesting attorney fees pursuant to I.C. § 12-121 and I.C. § 12-117. Therein, Defendant contended that Plaintiff commenced this litigation "without a reasonable basis in fact or law" and that the Plaintiff pursued this case "frivolously, unreasonably or without foundation." In return, Plaintiff filed a Motion to Disallow Attorney Fees, wherein it asserted that the complex nature of Plaintiff's claims and the Court's analysis in reaching its decision showed that Plaintiff had a reasonable basis in fact or law for bringing this action.

DISCUSSION

The Defendant argues that it is entitled to an award of attorney fees and costs under Idaho Code §§ 12-117 and 12-121. Idaho Code § 12-117 provides that:

> Unless otherwise provided by statute, in any administrative proceeding or civil judicial proceeding involving as adverse parties a state agency or political subdivision and a person, the state agency or political subdivision or the court, as the case may be, shall award the prevailing party reasonable attorney's fees, witness fees and other reasonable expenses, if it finds that the nonprevailing party acted without a reasonable basis in

fact or law.

I.C. § 12-117(1).

Idaho Code § 12-121 provides that:

> In any civil action, the judge may award reasonable attorney's fees to the prevailing party or parties, provided that this section shall not alter, repeal or amend any statute which otherwise provides for the award of attorney's fees. The term "party" or "parties" is defined to include any person, partnership, corporation, association, private organization, the state of Idaho or political subdivision thereof.

I.C. § 12-121.

Around the time Defendant submitted its Memorandum of Costs and Attorney Fees, the Idaho Supreme Court held that where a party requests attorney's fees pursuant to both I.C. § 12-117 and I.C. § 12-121, the request under I.C. § 12-121 is denied because I.C. § 12–117 is the exclusive means for awarding attorney's fees for the entities to which it applies. *Kepler-Fleenor v. Fremont County*, 152 Idaho 207, 268 P.3d 1159, 1165 (2012), *reh'g denied* (Jan. 30, 2012).

The Defendant argues that the Plaintiff pursued this case "without a reasonable basis in fact or law" and that the Plaintiff pursued this case "frivolously, unreasonably or without foundation." The Defendant further argues that this is particularly true considering that the Plaintiff continued to pursue this litigation despite Defendant's warnings and following this Court's decision in *Richard Hehr and Greystone Village, LLC v. City of McCall*, Valley County Case No. CV-2010-276-C and *Buckskin Properties, Inc. and Timberline Development, LLC v. Valley County*, Valley County Case No. CV-2009-554-C. However, as was the case with *Buckskin* and *Hehr*, this litigation was not frivolously pursued considering the complex nature of the legal issues involved in this case.

This case presented a number of its own challenging legal issues regarding, *inter alia*, (1) whether I.C. § 50-219's adoption of the notice of claim provisions of the ITCA also carried with it the jurisdictional requirement espoused in case law interpreting I.C. § 6-908; (2) when the cause of action for Plaintiff's federal claims accrued; and (3) whether the Plaintiff failed to exhaust its remedies as set out in the case of *KMST, LLC v. County of Ada*, 138 Idaho 577 (2003). In reaching its ultimate decision in Defendant's favor, the Court, as to Plaintiff's federal claims, disagreed with ***both*** parties' characterization of the Plaintiff's constitutional challenge as facial and had to engage in an analysis offered by neither party regarding the application of the paired holdings in *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005) and *Williamson County* to the facts of this case.

Although the Court ultimately ruled in the Defendant's favor, the Court cannot say that the Plaintiff pursued this case without a reasonable basis in fact or law as required in order to award fees pursuant to I.C. § 12-117. Therefore, the Court will deny the Defendant's Memorandum of Costs and Attorney Fees.

CONCLUSION

The Court DENIES the Defendant's Memorandum of Costs and Attorney Fees and GRANTS the Plaintiff's Motion to Disallow Attorney Fees.

DATED this 14 day of March, 2012.

MICHAEL McLAUGHLIN
DISTRICT JUDGE

Addendum 3

CERTIFICATE OF MAILING

I hereby certify that on the 14 day of March, 2012, I mailed (served) a true and correct copy of the within instrument to:

VALLEY COUNTY COURT
VIA EMAIL

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ARCHIE N. BANBURY
Clerk of the District Court

By: Jayne Thompson
Deputy Clerk